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UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY

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REGION 8

Docket No. FIFRA-08-2005-0001

FILED  
EPA REGION VIII  
HEARING CLERK

In the Matter of:

CAMPBELL AVIATION, INC.,  
a Montana corporation,

Respondent.

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**PENALTY COMPLAINT AND NOTICE OF  
OPPORTUNITY FOR HEARING**

**INTRODUCTION (JURISDICTION)**

1. This civil administrative enforcement action is authorized by Congress in section 14(a) of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. § 1361(a). EPA regulations authorized by the statute are set out in part 171 of title 40 of the Code of Federal Regulations, and violations of the regulations constitute violations of FIFRA, section 12, 7 U.S.C. § 136j. The rules for this proceeding are the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders and the Revocation, Termination or Suspension of Permits ("Rules of Practice")," 40 CFR part 22, a copy of which is enclosed.

2. The undersigned EPA officials have been properly delegated the authority to issue this action.

3. EPA alleges that Respondent has violated section 12(a)(2)(G), 7 U.S.C. § 136j(a)(2)(G) and proposes the assessment of a civil penalty as more fully explained below.

**NOTICE OF OPPORTUNITY FOR A HEARING**

4. Respondent has the right to a public hearing before an administrative law judge to disagree with (1) any fact alleged by EPA in the complaint, or (2) the appropriateness of the proposed penalty.

5. To disagree with the complaint/order, and assert your right to a hearing, Respondent must file a written answer (and one copy) with the Regional Hearing Clerk (999 18<sup>th</sup> Street, Denver, Colorado 80202-2466) within 30 days of receiving this complaint. The answer must clearly admit, deny or explain the factual allegations of the complaint, the grounds for any defense, the facts you may dispute, and your specific request for a public hearing. Please see section 22.15 of the Rules of Practice for a complete description of what must be in your answer.

**FAILURE TO FILE AN ANSWER AND REQUEST FOR HEARING WITHIN 30 DAYS  
MAY WAIVE RESPONDENT'S RIGHT TO DISAGREE WITH THE ALLEGATIONS  
OR PROPOSED PENALTY, AND RESULT IN A DEFAULT JUDGMENT AND  
ASSESSMENT OF THE PENALTY PROPOSED IN THE COMPLAINT.**

## QUICK RESOLUTION

6. Respondent may resolve this proceeding at any time by paying the specific penalty proposed in the complaint. Such payment need not contain any response to, or admission of, the allegations in the complaint. Such payment constitutes a waiver of respondent's right to contest the allegations and to appeal the final order. See section 22.18 of the Rules of Practice for a full explanation of the quick resolution process. If Respondent chooses to resolve this proceeding by paying the specific penalty proposed in this complaint, payment must be made, within thirty (30) calendar days of receipt of this complaint, by sending a certified or cashier's check payable to "Treasurer, United States of America," in care of:

U. S. EPA, Region VIII  
(Regional Hearing Clerk)  
Mellon Bank  
P.O. Box 360859M  
Pittsburgh, PA 15251

As follows:

A copy of the check must be mailed simultaneously to the attorney listed below.

## SETTLEMENT NEGOTIATIONS

7. EPA encourages discussing whether cases can be settled through informal settlement conferences. If you want to pursue the possibility of settling this matter, or have any other questions, contact Alicia N. Hoegh at [1-800-227-9441; extension 6876 or the address below. **Please note that calling the attorney or requesting a settlement conference does NOT delay the running of the 30 day period for filing an answer and requesting a hearing.**

## COUNT I

(Use of a registered pesticide in a manner inconsistent with its labeling  
a violation of section 136j(a)(2)(G) of FIFRA, 7 U.S.C. § 136j(a)(2)(G))

8. Respondent Campbell Aviation, Inc., is an aerial agricultural plant pest control business located at 1361 State Highway 79, Dutton, Montana, ("facility").

9. Respondent Campbell Aviation, Inc., is a "commercial applicator" as that term is defined at section 2(e)(3) of FIFRA, 7 U.S.C. § 136(2)(e)(3).

10. Respondent, Campbell Aviation, Inc., is a Montana corporation doing business in the State of Montana.

11. Respondent Campbell Aviation, Inc., is a "person" within the meaning of section 2(s) of FIFRA, 7 U.S.C. § 136(s) and, therefore, subject to the requirements of the statute and/or regulations.

12. Michael R. Campbell is the owner and operator of Campbell Aviation, Inc.

13. Michael R. Campbell is a "certified applicator" as that term is defined at section 2(e)(1) of FIFRA, 7 U.S.C. § 136(e)(1).

14. On August 28, 2004, Michael R. Campbell did, on behalf of Respondent Campbell Aviation, Inc., apply by aerial spraying a fungicide called Bravo Ultrex Super Weathstick onto a farmer's potato field and in so doing over sprayed or caused to be over sprayed the pesticide onto a vehicle traveling on the adjacent roadway.

15. Bravo Ultrex Super Weathstick is an agricultural fungicide and is, therefore, a "pesticide" as that term is defined at section 2(u) of FIFRA, 7 U.S.C. § 136(u).

16. Bravo Ultrex with Super Weathstick is a registered pesticide which bears EPA Registration Number 50534-201-100.

17. The label for the fungicide Bravo Ultrex with Super Weathstick states, among other things, "[d]o not apply this product in a way that will contact workers or other persons, or pets either directly or through drift."

18. Section 136j(a)(2)(G) of FIFRA, 7 U.S.C. § 136j(a)(2)(G), makes it unlawful for any person to use any registered pesticide in a manner inconsistent with its labeling.

19. Campbell Aviation, Inc., violated section 136j(a)(2)(G) of FIFRA, 7 U.S.C. § 136j(a)(2)(G), by using Bravo Ultrex with Super Weathstick, a registered pesticide, in a manner inconsistent with its labeling.

### **PROPOSED CIVIL PENALTY**

20. Section 14(a)(1) of FIFRA, 7 U.S.C. § 136l(a)(1) and 40 C.F.R. Part 19, authorizes the assessment of a civil penalty of up to \$6,500.00 for each day of each violation of FIFRA. Agency policy with respect to assessment of civil penalties under FIFRA is governed by EPA's Enforcement Response Policy for the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), July 2, 1990, (enclosed) which provides a rational and consistent method for applying the statutory penalty factors to the circumstances of specific cases. Using the policies to apply the statutory factors to the facts of this case, EPA proposes that a \$6,500 penalty be assessed against Respondent for the violation alleged above. The penalty calculation/narrative is enclosed and incorporated as attachment A to this complaint. Additionally, Complainant has enclosed a copy of a document titled "Information for Small Businesses"

To discuss settlement or ask any questions you may have about this process, please contact Alicia N. Hoegh, Enforcement Attorney, at 303-312-6876, or the address below.

United States Environmental Protection Agency  
Region 8, Office of Enforcement, Compliance and  
Environmental Justice, Complainant  
999 18<sup>th</sup> Street, Suite 500 (ENF-L)  
Denver, CO 80202-2466

Date: 4 January 2005

By: Elisabeth Evans  
Elisabeth Evans, Director  
Technical Enforcement Program

Date: 4 January 2005

David Janik  
David Janik, Supervisory Attorney  
Legal Enforcement Program

Date: Jan 4, 2005

Alicia N. Hoegh  
Alicia N. Hoegh, Enforcement Attorney

**In the Matter of Campbell Aviation, Inc.**

**Docket No.:** FIFRA-08-2005-0001

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that the original and one copy of the COMPLAINT, AND NOTICE OF OPPORTUNITY FOR HEARING was hand-carried to the Regional Hearing Clerk, EPA Region VIII, 999 18th Street, Suite 300, Denver, Colorado, and that a true copy of the same was sent certified mail to:

E. Colleen Campbell  
Registered Agent for  
Campbell Aviation, Inc.  
1361 State Highway 79  
P.O. Box 166  
Dutton, Montana 59433

Date: January 4, 2005

Judith McTernan

Judith McTernan

**ENFORCEMENT RESPONSE POLICY  
FOR THE  
FEDERAL INSECTICIDE, FUNGICIDE, AND RODENTICIDE ACT (FIFRA)**

**Office of Compliance Monitoring  
Office of Pesticides and Toxic Substances  
U.S. Environmental Protection Agency**

**July 2, 1990**

## **Penalty Calculation Narrative Campbell Aviation, Inc.**

1. To ensure uniform and consistent enforcement response, the application of the statutory penalty criteria in the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), EPA developed the July 2, 1990 Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act (1990 Policy) was used.

2. Campbell Aviation, Inc. (Campbell) is covered under FIFRA Section 14(a)(1), i.e., Campbell is a commercial applicator.

3. According to the policy identified in paragraph 1, the appropriate enforcement response for a violation of FIFRA Section 12(a)(2)(G), to use any registered pesticide in a manner inconsistent with its labeling, is a civil penalty. Persons covered under FIFRA 14(a)(1) may be assessed a civil penalty for each offense.

4. Based on EPA's August 31, 2004 inspection, Campbell is charged with allegedly violating FIFRA Section 12(a)(2)(G) one time by: misusing a pesticide by applying it in a manner which allowed it to contact persons directly or through drift.

5. FIFRA Section 14(a)(4) requires EPA to "consider the appropriateness of such [a civil] penalty to the size of the business of the person charged, the effect on the person's ability to continue in business, and the gravity of the violation."

6. Following the guidance in the policy, EPA calculates a proposed civil penalty using the following process. First, the gravity of the offense is identified using Appendix A of the 1990 Policy. Appendix A of the 1990 Policy identifies violations of FIFRA Section 12(a)(2)(G), as gravity level 2.

7. Second, according to the policy EPA determines the size of the business category of the respondent. The penalty for Campbell has been calculated using the Category I - size of business (gross revenues greater than \$1,000,000) with the understanding that the proposed penalty would be recalculated if information becomes available that shows this assumption is incorrect.

8. Third, EPA used the above gravity and size of business components and the Civil Penalty Matrix for FIFRA Section 14(a)(1) violations, on page 19 of the 1990 Policy, to determine the dollar amount of the proposed penalty. Category I businesses with violations of gravity level 2 are assessed a penalty of \$6,500 for each violation. On March 15, 2004, the civil penalty amount was increased to \$6,500 under authority of the Debt Collection Improvement Act of 1996 (69 Federal Register 7121). The dollar amounts given in the Civil Penalty Matrix for FIFRA Section 14(a)(1) violations, on page 19 of the 1990 Policy were adjusted to reflect this increase.

9. The 1990 Policy then directs that the actual circumstances of the violation be considered using gravity adjustment criteria. The penalty amounts determined from the matrix can be adjusted either upward or downward depending on the specifics of the case known to EPA at the time of the penalty calculation. The following gravity adjustment values were used to evaluate Campbell's violation of FIFRA §12(a)(2)(G):

- (a) The pesticide applied by Campbell was assigned the following value for toxicity using Appendix B of the 1990 Policy:

Bravo Ultrex with SuperWeatherstick, EPA Reg. No. 50534-201-100;  
(signal word: danger) gravity adjustment level of 2.

- (b) The human harm adjustment was assigned a value of 1 as there was minor potential for harm to human health.
- (c) The environmental harm adjustment was assigned a value of 1 as there was minor potential for harm to the environment.
- (d) Region 8 has no record of previous FIFRA violations in which a Civil Complaint was issued to Campbell during the past 5 years, however, the Montana Department of Agriculture has record of one pesticide use violation within the last 5 years, which was assessed a civil penalty. The Montana violation was of the Montana Pesticide Act, which is the state law under which Montana runs the "pesticide use" program delegated to Montana under FIFRA Section 23. Therefore, an assigned value of 2 was used for this adjustment, as Campbell is a 14(a)(1) person with one prior violation of FIFRA.
- (e) Campbell's culpability for this violation is unknown and is therefore, assigned a value of 2.

The above factors resulted in a total gravity adjustment value of 8 for Count 1.

10. Using the Gravity Adjustment Value of 8, Table 3 in Appendix C of the 1990 Policy sets the penalty adjustment at 0% for Count 1, resulting in no penalty change. Thus, the total penalty for the count is \$6,500.

11. Finally, EPA attempts to take into consideration what effect the total calculated penalty of \$6,500 would have on the ability of Campbell to continue to operate. However, based on the limited financial data available, no adjustment to the proposed penalty was considered warranted at this time. Adjustments of the proposed penalty can be made at a later date should information warranting such a change become available.



12. In summary, EPA arrived at a penalty of \$6,500 for Campbell Aviation, Inc. for one (1) count of violating FIFRA Section 12(a)(2)(G) by: misuse of pesticide, applying in a manner which allows it to contact persons directly or through drift. This penalty was arrived at by considering all FIFRA Section 14(a)(4) penalty criteria, through the use of the 1990 Policy.

Prepared by: David Rise    Date: 12/06/2004

develop an effective process permitting elected officials and other representatives of State, local and tribal governments "to provide meaningful and timely input to the development of regulatory proposals containing significant unfunded mandates."

Today's rule does not create a mandate on State, local or tribal governments. This rule does not impose any enforceable duties on these entities. Instead, it merely revises the procedural rules governing EPA's administrative enforcement proceedings.

#### F. Executive Order 13045

Executive Order 13045: "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997) applies to any rule that: (1) is determined to be "economically significant" as defined under E.O. 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

This final rule is not subject to the E.O. 13045 because it is not "economically significant" as defined in E.O. 12866, and because it does not involve decisions based on environmental health or safety risks.

#### G. Executive Order 13084

Under Executive Order 13084, EPA may not issue a regulation that is not required by statute, that significantly or uniquely affects the communities of Indian tribal governments, and that imposes substantial direct compliance costs on those communities, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by the tribal governments, or EPA consults with those governments. If EPA complies by consulting, Executive Order 13084 requires EPA to provide to the Office of Management and Budget, in a separately identified section of the preamble to the rule, a description of the extent of EPA's prior consultation with representatives of affected tribal governments, a summary of the nature of their concerns, and a statement supporting the need to issue the regulation. In addition, Executive Order 13084 requires EPA to develop an effective process permitting elected and other representatives of Indian tribal governments "to provide meaningful and timely input in the

development of regulatory policies on matters that significantly or uniquely affect their communities."

Today's rule does not significantly or uniquely affect the communities of Indian tribal governments. Accordingly, the requirements of section 3(b) of Executive Order 13084 do not apply to this rule.

#### H. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Public Law 104-113, section 12(d) (15 U.S.C. 272 note), directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA requires EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This action does not involve technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

#### I. Submission to Congress and the Comptroller General

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the Federal Register. This rule is not a "major rule" as defined by 5 U.S.C. 804(2).

#### List of Subjects in 40 CFR Part 22

Environment protection, Administrative practice and procedure, Air pollution control, Hazardous substances, Hazardous waste, Penalties, Pesticides and pests, Poison prevention, Superfund, Waste treatment and disposal, Water pollution control, Water supply.

Dated: June 30, 1999.

Carol M. Browner,  
Administrator.

Therefore, 40 CFR part 22 is revised to read as follows:

### PART 22—CONSOLIDATED RULES OF PRACTICE GOVERNING THE ADMINISTRATIVE ASSESSMENT OF CIVIL PENALTIES, ISSUANCE OF COMPLIANCE OR CORRECTIVE ACTION ORDERS, AND THE REVOCATION, TERMINATION OR SUSPENSION OF PERMITS

#### Subpart A—General

##### Sec.

- 22.1 Scope of this part.
- 22.2 Use of number and gender.
- 22.3 Definitions.
- 22.4 Powers and duties of the Environmental Appeals Board, Regional Judicial Officer and Presiding Officer; disqualification, withdrawal, and reassignment.
- 22.5 Filing, service, and form of all filed documents; business confidentiality claims.
- 22.6 Filing and service of rulings, orders and decisions.
- 22.7 Computation and extension of time.
- 22.8 Ex parte discussion of proceeding.
- 22.9 Examination of documents filed.

#### Subpart B—Parties and Appearances

- 22.10 Appearances.
- 22.11 Intervention and non-party briefs.
- 22.12 Consolidation and severance.

#### Subpart C—Prehearing Procedures

- 22.13 Commencement of a proceeding.
- 22.14 Complaint.
- 22.15 Answer to the complaint.
- 22.16 Motions.
- 22.17 Default.
- 22.18 Quick resolution; settlement; alternative dispute resolution.
- 22.19 Prehearing information exchange; prehearing conference; other discovery.
- 22.20 Accelerated decision; decision to dismiss.

#### Subpart D—Hearing Procedures

- 22.21 Assignment of Presiding Officer; scheduling the hearing.
- 22.22 Evidence.
- 22.23 Objections and offers of proof.
- 22.24 Burden of presentation; burden of persuasion; preponderance of the evidence standard.
- 22.25 Filing the transcript.
- 22.26 Proposed findings, conclusions, and order.

#### Subpart E—Initial Decision and Motion to Reopen a Hearing

- 22.27 Initial decision.
- 22.28 Motion to reopen a hearing.

#### Subpart F—Appeals and Administrative Review

- 22.29 Appeal from or review of interlocutory orders or rulings.
- 22.30 Appeal from or review of initial decision.



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## U. S. EPA Small Business Resources

If you own a small business, the United States Environmental Protection Agency (EPA) offers a variety of compliance assistance and tools to assist you in complying with federal and state environmental laws. These resources can help you understand your environmental obligations, improve compliance and find cost-effective ways to comply through the use of pollution prevention and other innovative technologies.

### Hotlines, Helplines and Clearinghouses

EPA sponsors approximately 89 free hotlines and clearinghouses that provide convenient assistance regarding environmental requirements.

**The National Environmental Compliance Assistance Clearinghouse** provides quick access to compliance assistance tools, contacts, and planned activities from the U.S. EPA, states, and other compliance assistance providers: <http://www.epa.gov/clearinghouse>

**Pollution Prevention Clearinghouse**  
<http://www.epa.gov/opptintr/library/ppicindex.htm>

**EPA's Small Business Ombudsman Hotline** can provide a list of all the hot lines and assist in determining the hotline best meeting your needs:  
(800) 368-5888

**Emergency Planning and Community Right-To-Know Act**  
(800) 424-9346

**National Response Center** (to report oil and hazardous substance spills)  
(800) 424-8802

**Toxics Substances and Asbestos Information**  
(202) 554-1404

**Safe Drinking Water**  
(800) 426-4791

**Stratospheric Ozone and Refrigerants Information**  
(800) 296-1996

**Clean Air Technology Center**  
(919) 541-0800

**Wetlands Helpline**  
(800) 832-7828

### EPA Websites

EPA has several Internet sites that provide useful compliance assistance information and materials for small businesses. If you don't have access to the Internet at your business, many public libraries provide access to the Internet at minimal or no cost.

**EPA's Home Page**  
<http://www.epa.gov>

**Small Business Assistance Program**  
<http://www.epa.gov/ttn/sbap>

**Office of Enforcement and Compliance Assurance**  
<http://www.epa.gov/compliance>

**Compliance Assistance Home Page**  
<http://www.epa.gov/compliance/assistance>

**Office of Regulatory Enforcement**  
<http://www.epa.gov/compliance/civil/index.html>

**Office of Site Remediation Enforcement**  
<http://www.epa.gov/compliance/cleanup>

**Innovative Programs for Environmental Performance**  
<http://www.epa.gov/partners>

**Small Business Ombudsman**  
[www.sba.gov/ombudsman](http://www.sba.gov/ombudsman)



## **NOTICE OF SECURITIES AND EXCHANGE COMMISSION REGISTRANTS' DUTY TO DISCLOSE ENVIRONMENTAL LEGAL PROCEEDINGS**

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Securities and Exchange Commission regulations require companies registered with the SEC (e.g., publicly traded companies) to disclose, on at least a quarterly basis, the existence of certain administrative or judicial proceedings taken against them arising under Federal, State or local provisions that have the primary purpose of protecting the environment. Instruction 5 to Item 103 of the SEC's Regulation S-K (17 CFR 229.103) requires disclosure of these environmental legal proceedings. For those SEC registrants that use the SEC's "small business issuer" reporting system, Instructions 1-4 to Item 103 of the SEC's Regulation S-B (17 CFR 228.103) requires disclosure of these environmental legal proceedings.

If you are an SEC registrant, you have a duty to disclose the existence of pending or known to be contemplated environmental legal proceedings that meet any of the following criteria (17 CFR 229.103(5)(A)-(C)):

- A. Such proceeding is material to the business or financial condition of the registrant;
- B. Such proceeding involves primarily a claim for damages, or involves potential monetary sanctions, capital expenditures, deferred charges or charges to income and the amount involved, exclusive of interest and costs, exceeds 10 percent of the current assets of the registrant and its subsidiaries on a consolidated basis; or
- C. A governmental authority is a party to such proceeding and such proceeding involves potential monetary sanctions, unless the registrant reasonably believes that such proceeding will result in no monetary sanctions, or in monetary sanctions, exclusive of interest and costs, of less than \$100,000; provided, however, that such proceedings which are similar in nature may be grouped and described generically.

Specific information regarding the environmental legal proceedings that must be disclosed is set forth in Item 103 of Regulation S-K or, for registrants using the "small business issuer" reporting system, Item 103(a)-(b) of Regulation S-B. If disclosure is required, it must briefly describe the proceeding, "including the name of the court or agency in which the proceedings are pending, the date instituted, the principal parties thereto, a description of the factual basis alleged to underlie the proceedings and the relief sought."

You have been identified as a party to an environmental legal proceeding to which the United States government is, or was, a party. If you are an SEC registrant, this environmental legal proceeding may trigger, or may already have triggered, the disclosure obligation under the SEC regulations described above.

This notice is being provided to inform you of SEC registrants' duty to disclose any relevant environmental legal proceedings to the SEC. This notice does not create, modify or interpret any existing legal obligations, it is not intended to be an exhaustive description of the legally applicable requirements and it is not a substitute for regulations published in the Code of Federal Regulations. This notice has been issued to you for information purposes only. No determination of the applicability of this reporting requirement to your company has been made by any governmental entity. You should seek competent counsel in determining the applicability of these and other SEC requirements to the environmental legal proceeding at issue, as well as any other proceedings known to be contemplated by governmental authorities.

If you have any questions about the SEC's environmental disclosure requirements, please contact the Office of Chief Counsel in the SEC's Division of Corporation Finance. The phone number is (202) 942-2900.